

PART 773—SURFACE TRANSPORTATION PROJECT DELIVERY PILOT PROGRAM

Sec.

773.101 Purpose.

773.102 Applicability.

773.103 Definitions.

773.104 Eligibility.

773.105 Statements of interest.

773.106 Application requirements for participation in the program.

773.107 Application approval.

773.108 Application amendments.

APPENDIX A TO PART 773—FHWA ENVIRONMENTAL RESPONSIBILITIES THAT MAY BE ASSIGNED UNDER SECTION 6005.

AUTHORITY: 23 U.S.C. 315 and 327; 49 CFR 1.48.

SOURCE: 72 FR 6470, Feb. 12, 2007, unless otherwise noted.

§ 773.101 Purpose.

The purpose of this part is to establish the requirements, as directed by 23 U.S.C. 327(b)(2), relating to the information which must be contained in an application by a State to participate in the program allowing the Secretary to assign, and a State Department of Transportation (State DOT) to assume, responsibilities for compliance with the National Environmental Policy Act (NEPA) (42 U.S.C. 4321–4347) and other Federal environmental laws pertaining to the review or approval of a highway project(s).

§ 773.102 Applicability.

This part applies to any State DOT eligible under the provisions of 23 U.S.C. 327 that submits an application for participation in the program.

§ 773.103 Definitions.

Unless otherwise specified in this part, the definitions in 23 U.S.C. 101(a) are applicable to this part. As used in this part:

Classes of highway projects means either a defined group of highway projects or all highway projects to which Federal environmental laws apply.

Federal environmental law means any Federal law or Executive Order (EO) under which the Secretary of the United States Department of Transportation has responsibilities for environ-

mental review, consultation, or other action with respect to the review or approval of highway projects. A list of the Federal environmental laws for which a State DOT may assume the responsibilities of the Secretary under this pilot program include, but are not limited to, the list of laws contained in Appendix A to this Part. But, under 23 U.S.C. 327(a)(2)(B), the Secretary's responsibility for conformity determinations required under section 176 of the Clean Air Act (42 U.S.C. 7506) and the responsibility imposed on the Secretary under 23 U.S.C. 134 and 135 are not included in the program. Also, Federal environmental law includes only laws that are inherently environmental and does not include responsibilities such as Interstate access approvals (23 U.S.C. 111).

Highway project means any undertaking to construct (including initial construction, reconstruction, replacement, rehabilitation, restoration, or other improvements) a highway, bridge, or tunnel, or any portion thereof, including environmental mitigation activities, which is eligible for assistance under title 23 of the United States Code. A highway project may include an undertaking that involves a series of contracts or phases, such as a corridor, and also may include anything that may be constructed in connection with a highway, bridge, or tunnel. However, the term highway project does not include any of the priority projects designated under Executive Order 13274; does not include any Federal Lands Highway project unless such project is to be designed and constructed by the State DOT; and does not include projects that are funded under chapter 53 of title 49, United States Code. Nothing in this part is intended to limit the consideration of any alternative in conducting an environmental analysis under any Federal environmental law, even if the particular alternative would provide for a project that is excluded under this section and may consider and include that alternative within the range of alternatives for a highway project.

Program means the "Surface Transportation Project Delivery Program" established under 23 U.S.C. 327, which allows up to five State DOTs to assume

Federal Highway Administration, DOT

§ 773.106

all or part of the responsibilities for environmental review, consultation, or other action required under any Federal environmental law pertaining to the review or approval of one or more highway projects.

§ 773.104 Eligibility.

(a) Only a State DOT of a State is eligible to participate in the program.

(b) The program is limited to a maximum five State DOTs, including the State DOTs of Alaska, California, Ohio, Oklahoma and Texas as the five participant States. Should any of these five State DOTs choose not to apply, have its participation terminated, or withdraw from the pilot program, another State DOT may be selected.

§ 773.105 Statements of interest.

(a) The State DOTs of Alaska, California, Ohio, Oklahoma and Texas are given priority for participation in the program.

(b) Within sixty days of March 14, 2007, the State DOTs of Alaska, California, Ohio, Oklahoma and Texas shall submit a statement of interest to participate in the program. The statement of interest shall declare that the State DOT intends to submit an application to participate in the pilot program.

(c) Should any of the State DOTs of Alaska, California, Ohio, Oklahoma and Texas fail to submit a statement of interest by May 14, 2007 or decline participation in the pilot program, such State DOT shall no longer be given priority consideration for selection in the program and its application will be selected in competition with other State DOTs.

(d) Should any of the State DOTs of Alaska, California, Ohio, Oklahoma and Texas submit a statement of interest declaring their intent to participate in the program, the State shall actively work to develop and submit its application and meet all applicable program criteria (including the enactment of necessary State legal authority).

§ 773.106 Application requirements for participation in the program.

(a) Each State DOT wishing to participate in the program must submit an application to the FHWA.

(b) Each application submitted to the FHWA must contain the following information:

(1) The highway project(s) or classes of highway projects for which the State is requesting to assume FHWA's responsibilities under NEPA. The State DOT must specifically identify, in its application, each project for which a draft environmental impact statement has been issued prior to the submission of its application to the FHWA;

(2) The specific responsibilities for the environmental review, consultation, or other action required under other Federal environmental laws, if any, pertaining to the review or approval of a highway project, or classes of highway projects, that the State DOT wishes to assume under this program. The State DOT must also indicate whether it proposes to phase-in the assumption of these responsibilities;

(3) For each responsibility requested in paragraphs (b)(1) and (b)(2) of this section, the State DOT shall submit a description in the application detailing how it intends to carry out these responsibilities. The description shall include:

(i) A summary of State procedures currently in place to guide the development of documents, analyses and consultations required to fulfill the environmental responsibilities requested. The actual procedures should be submitted with the application, or if available electronically, the Web link must be provided;

(ii) Any changes that have been or will be made in the management of the environmental program to provide the additional staff and training necessary for quality control and assurance, appropriate levels of analysis, adequate expertise in areas where responsibilities have been requested, and expertise in management of the NEPA process;

(iii) A discussion of how the State DOT will verify legal sufficiency for the environmental document it produces; and

(iv) A discussion of how the State DOT will identify and address those projects that would normally require FHWA headquarters prior concurrence of the FEIS under 23 CFR 771.125(c).

(4) A verification of the personnel necessary to carry out the authority that may be granted under the program. The verification shall contain the following information:

(i) A description of the staff positions, including management, that will be dedicated to providing the additional functions needed to accept the delegated responsibilities;

(ii) A description of any changes to the State DOT's organizational structure that are deemed necessary to provide for efficient administration of the responsibilities assumed; and

(iii) A discussion of personnel needs that may be met by the State DOTs use of outside consultants, including legal counsel provided by the State Attorney General or private counsel;

(5) A summary of financial resources showing the anticipated financial resources available to meet the activities and staffing needs identified in (b)(3) and (b)(4) of this part, and a commitment to make adequate financial resources available to meet these needs;

(6) Certification and explanation by State's Attorney General, or other State official legally empowered by State law, that the State DOT can and will assume the responsibilities of the Secretary for the Federal environmental laws and projects requested and that the State DOT will consent to exclusive Federal court jurisdiction with respect to the responsibilities being assumed. Such consent must be broad enough to include future changes in relevant Federal policies and procedures to which FHWA would be subject or such consent would be amended to include such future changes;

(7) Certification by the State's Attorney General, or other State official legally empowered by State law, that the State has laws that are comparable to the Federal Freedom of Information Act (5 U.S.C. 552), including laws that allow for any decision regarding the public availability of a document under those laws to be reviewed by a court of competent jurisdiction; and

(8) Evidence that the required notice and solicitation of public comment by the State DOT relating to participation in the program has taken place. Requirements for notice and solicitation of public comments are as follows:

(i) not later than 30 days prior to submitting its application, a State must give notice that the State intends to participate in the program and solicit public comment by publishing the complete application of the State in accordance with the appropriate public notice law of the State. If allowed under State law, publishing a notice of availability of the application rather than the application itself may satisfy the requirements of this subparagraph so long as the complete application is made reasonably available to the public for inspection and copying, and

(ii) copies of all comments received shall be submitted with the application. The State should summarize the comments received, and note changes, if any, that were made in the application in response to public comments.

(c) The application shall be signed by the Governor or the head of the State agency having primary jurisdiction over highway matters. The application must also identify a point of contact for questions regarding the application. Applications may be submitted in electronic format.

§ 773.107 Application approval.

If a State DOT's application is approved, then the State DOT will be invited to enter into a written Memorandum of Understanding (MOU) with the FHWA, as provided in 23 U.S.C. 327. None of FHWA's responsibilities under NEPA or other environmental laws may be assumed by the State DOT prior to execution of the MOU.

§ 773.108 Application amendments.

(a) After a State DOT submits its application to the FHWA, but prior to the execution of a MOU, the State DOT may amend its application at any time to request additional highway projects, classes of highway projects, or more environmental responsibilities. However, prior to making any such amendments, the State DOT must provide notice and solicit public comments with respect to the intended amendments. In submitting the amendment to the FHWA, the State DOT must provide copies of all comments received and note the changes, if any, that were made in response to the comments.

Federal Highway Administration, DOT

Pt. 774

(b) A State DOT may amend its application no earlier than one year after a MOU has been executed to request additional highway projects, classes of highway projects, or more environmental responsibilities. However, prior to making any such amendments, the State DOT must provide notice and solicit public comments with respect to the intended amendments. In submitting the amendment to the FHWA, the State DOT must provide copies of all comments received and note the changes, if any, that were made in response to the comments.

APPENDIX A TO PART 773—FHWA ENVIRONMENTAL RESPONSIBILITIES THAT MAY BE ASSIGNED UNDER SECTION 6005

Federal Procedures

National Environmental Policy Act (NEPA), 42 U.S.C. 4321-43351.
FHWA Environmental Regulations at 23 CFR Part 771, 772 and 777
CEQ Regulations at 40 CFR 1500-1508
Clean Air Act, 42 U.S.C. 7401-7671(q). *Any determinations that do not involve conformity.*

Noise

Compliance with the noise regulations at 23 CFR part 772

Wildlife

Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1531-1544, and Section 1536 Marine Mammal Protection Act, 16 U.S.C. 1361
Anadromous Fish Conservation Act, 16 U.S.C. 757(a)-757(g)
Fish and Wildlife Coordination Act, 16 U.S.C. 661-667(d)
Migratory Bird Treaty Act, 16 U.S.C. 703-712
Magnuson-Stevenson Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. 1801 *et seq.*

Historic and Cultural Resources

Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470(f) *et seq.*
Archeological Resources Protection Act of 1977, 16 U.S.C. 470(aa)-11
Archeological and Historic Preservation Act, 16 U.S.C. 469-469(c)
Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001-3013

Social and Economic Impacts

American Indian Religious Freedom Act, 42 U.S.C. 1996

Farmland Protection Policy Act (FPPA), 7 U.S.C. 4201-4209

Water Resources and Wetlands

Clean Water Act, 33 U.S.C. 1251-1377
Section 404
Section 401
Section 319
Coastal Barrier Resources Act, 16 U.S.C. 3501-3510
Coastal Zone Management Act, 16 U.S.C. 1451-1465
Safe Drinking Water Act (SDWA), 42 U.S.C. 300(f)-300(j)(6)
Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403
Wild and Scenic Rivers Act, 16 U.S.C. 1271-1287
Emergency Wetlands Resources Act, 16 U.S.C. 3921, 3931
TEA-21 Wetlands Mitigation, 23 U.S.C. 103(b)(6)(m), 133(b)(11)
Flood Disaster Protection Act, 42 U.S.C. 4001-4128

Parklands

Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 303
Land and Water Conservation Fund (LWCF), 16 U.S.C. 4601-4604

Hazardous Materials

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601-9675
Superfund Amendments and Reauthorization Act of 1986 (SARA)
Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901-6992(k)

Executive Orders Relating to Highway Projects

E.O. 11990 Protection of Wetlands
E.O. 11988 Floodplain Management
E.O. 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
E.O. 13112 Invasive Species

PART 774—PARKS, RECREATION AREAS, WILDLIFE AND WATERFOWL REFUGES, AND HISTORIC SITES (SECTION 4(F))

Sec.

774.1 Purpose.
774.3 Section 4(f) approvals.
774.5 Coordination.
774.7 Documentation.
774.9 Timing.
774.11 Applicability.
774.13 Exceptions.
774.15 Constructive use determinations.
774.17 Definitions.